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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 IN RE PORTFOLIO RECOVERY
12 ASSOCIATES, LLC, TELEPHONE
13 CONSUMER PROTECTION ACT
14 LITIGATION

Case No.: 11md02295 JAH-BGS

Member cases:
All member cases

15 **ORDER GRANTING PLAINTIFF'S**
16 **MOTION TO STAY [Doc. No. 858]**

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18 Plaintiffs seek a stay of this action pending the resolution of *Brickman v. Facebook,*
19 *Inc.*, currently before the Ninth Circuit Court of Appeals. They contend the Ninth Circuit
20 will resolve the issue of whether the definition of an automatic dialing system (“ATDS”) under the Telephone Consumer Protection Act (“TCPA”) includes a system that stores
21 numbers to be called using a random or sequential number generator. Plaintiffs disagree
22 with this Court’s interpretation of the Supreme Court’s holding in *Facebook, Inc. v. Duguid*, 141 S.Ct 1163 (2021) that an ATDS must randomly generate the telephone
23 numbers to be called. Plaintiffs maintain a stay will promote judicial economy, can avoid
24 the Court rendering a decision on Defendant’s motion summary judgment that may need
25 to be revisited and will avoid substantial hardship to Plaintiffs in the form of inconsistent
26 rulings and costly, potentially unnecessary litigation because *Brickman*’s challenges to the
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1 definition of an ATDS go to the heart of Plaintiffs' claims in this case. They contend they
2 are able to show that the systems used by Defendant use a random or sequential number
3 generator to store numbers and thus qualify as an ATDS, if the Ninth Circuit agrees with
4 Brickman's arguments that an ATDS does not have to randomly generate the telephone
5 numbers dialed. Additionally, Plaintiffs argue Defendant will suffer no harm from a stay
6 given the class action was filed in 2010 and that the MDL was created in 2011 and the stay
7 would be a short delay.

8 Defendant argues Plaintiffs' request is inefficient and untimely because it was filed
9 just three (3) business days before their response to the motion for summary judgment was
10 due, three (3) weeks after the motion was filed and two (2) weeks after the Court's order
11 setting the briefing schedule on the motion and the briefing in the *Brickman* matter was
12 completed on June 1, 2022. Defendant further argues the equities do not favor another stay
13 of the action given the length of the lawsuit, the precedential effect of *Duguid* and the
14 uncertain nature of the delay imposed by a stay based on *Brickman*. Defendant suggests
15 this Court has the discretion, following the hearing on the motion for summary judgment,
16 to take the matter under advisement and order supplemental briefing after *Brickman* if the
17 Court finds Defendants' cited authority insufficiently persuasive. Additionally, Defendant
18 argues the definition of an ATDS is settled, and *Brickman* will not provide guidance that
19 this Court needs because it is highly unlikely to change the outcome of the summary
20 judgment motion here.

21 A court has the inherent authority to stay an action pursuant to its power to control
22 its own docket. *Landis v. North American Co.*, 299 U.S. 248, 254-55, (1936); *Leyva v.*
23 *Certified Growers, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979). It may stay a case "pending
24 resolution of independent proceedings which bear upon the case," even if those
25 proceedings are not "necessarily controlling of the action before the court." *Leyva*, 593
26 F.2d at 863-64. When determining whether to stay an action, courts must weigh competing
27 interests that will be affected by the granting or refusal to grant a stay. *CMAX, Inc. v. Hall*,
28 300 F.2d 265, 268 (9th Cir. 1962). "Among these competing interests are the possible

1 damage which may result from the granting of a stay, the hardship or inequity which a
2 party may suffer in being required to go forward, and the orderly course of justice measured
3 in terms of the simplifying or complicating of issues, proof, and questions of law which
4 could be expected to result from a stay.” *Id.* (citing *Landis*, 299 U.S. at 254–55).

5 In its order denying Plaintiffs’ application to reopen discovery, this Court rejected
6 Plaintiffs’ theory that the Supreme Court in *Duguid* determined a dialing system qualifies
7 as an ATDS if it uses a random or sequential number generator to either store numbers or
8 store the numbers in a list and call them, upon finding “[t]he definition of an autodialer
9 does not concern systems that randomly or sequentially store and dial numbers from a list
10 that is generated in a non-random and non-sequential way”. Order at 6-7 (Doc. No. 843).
11 Defendant’s pending motion for summary judgment argues Plaintiffs’ TCPA claims fail
12 because Defendant’s dialing systems do not have the capacity to randomly or sequentially
13 generate phone numbers to call. In *Brickman*, the plaintiff argues the district court erred
14 in dismissing his TCPA action which alleged the dialing system at issue uses a random or
15 sequential number generator to store numbers in a sequential or random order and send a
16 text in the sequential or random order determined by the number generator. Appellant’s
17 Opening Brief (Pla’s Exh. 1). Similar to Plaintiffs here, *Brickman* does not allege the
18 telephone numbers called are created by the defendant’s equipment but are from a
19 preproduced list. *See id.* As such, the *Brickman* action pending before the Ninth Circuit
20 will address an issue currently before this Court.

21 The Court finds a stay of the action pending the Ninth Circuit’s decision in
22 *Brickman* will not result in undue prejudice to Defendant and will promote the orderly
23 course of justice by simplifying issues. To avoid any unnecessary hardship to Defendant,
24 the Court will not require Defendant to refile its pending motion for summary judgment
25 which is fully briefed. The motion will be withdrawn without prejudice to permit
26 Defendant to re-notice the motion with a new hearing date once the stay is lifted.

27 Accordingly, IT IS HEREBY ORDERED:

28 1. Plaintiffs’ motion to stay is **GRANTED**;

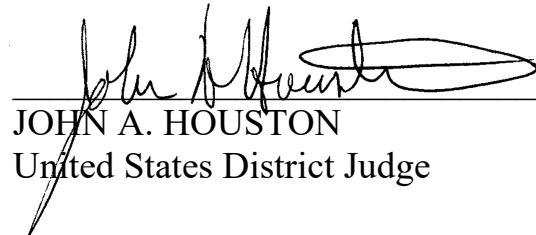
1 2. The action is stayed pending the Ninth Circuit's decision in *Brickman v.*
2 *Facebook*;

3 3. The parties shall notify the Court of the decision in *Brickman* **no later than**
4 **two (2) weeks after the Ninth Circuit issues its decision**;

5 4. Defendant's motion for summary judgment is **WITHDRAWN without**
6 **prejudice**.

7 5. The hearing set for Defendant's motion for summary judgment is **VACATED**
8 to be rescheduled at a later date.

9 DATED: August 8, 2022

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12 JOHN A. HOUSTON
13 United States District Judge
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